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# In The Supreme Court of the United States

**D. EPPS LACY and JAMES LACY,**

***Petitioners,***

**v.**

**BOARD OF SUPERVISORS OF HALIFAX COUNTY, VIRGINIA,**

***Respondent.***

**On Petition for a Writ of Certiorari to the Supreme Court of Virginia**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Fifth Amendment to the United States Constitution prohibits a local government from exercising its powers of eminent domain to acquire a right-of-way for the purpose of constructing a public road which will be open to the general public as part of the Commonwealth of Virginia's secondary highway system?

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## BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Rules of the United States Supreme Court, the Board of Supervisors of Halifax County files this Brief in Opposition to the Petition for Writ of Certiorari filed by D. Epps Lacy and James P. Lacy.

## STATEMENT OF THE CASE

### A. Procedural History

This case arises out of a condemnation proceeding involving approximately 3 acres of land in Halifax County, Virginia.

On April 6, 2005, the Board of Supervisors of Halifax County ("the County") filed a Petition for Condemnation in the Circuit Court for Halifax County ("the circuit court"). The Petition sought the condemnation of real property owned by D. Epps Lacy and James P. Lacy ("the Lacys") to permit the construction of a public road, as part of the secondary system of state highways, over the route of an existing prescriptive easement. (App. 322a).[1] The Petition described the public purpose for the taking:

> The public use for which the property is to be taken is the construction of a new access road to serve the said King Village property, which access road will provide a safe and adequate means of traveling between State Route 614 and the King Village property, and which will enable access to the King Village property by emergency response vehicles under all weather conditions, and which will enable public school buses to serve the public need

[1] References to the Appendix contained in the Petition for Writ of Certiorari ("Petition") will be denoted "(App. ___)."

> for safe, adequate and convenient public school bus service to school-age children and their families.

(App. 324a).

In their Answer and Grounds of Defense, the Lacys asserted that the taking was for a "private purpose and not for a constitutionally permissible public use." (App. 318a-319a). They further alleged that the taking was motivated by fraud and was arbitrary and capricious. (App. 319a).

On September 14, 2005, an evidentiary hearing was held to determine whether the taking was for a public use. (App. 20a, 98a, 102a). Based upon the evidence and arguments of counsel, the circuit court found as fact that:

> The present road is in such a state of disrepair that the school bus does not go down the road to pick up children from Kings Village. There have been many instances in which fire trucks, fuel trucks and other service vehicles could not get down the road to service the community. The road is so narrow that two vehicles normally can't pass on the road.

(App. 21a). The circuit court further found that the road to be constructed "will become a part of Virginia's secondary highway system . . . . [and] will be open for use by the public." (App. 21a).

Addressing the question of "public use," the circuit court concluded that "[t]he evidence does not establish that a particular group of individuals is using the government's power of eminent domain to take property for that group's benefit." (App. 14a, 22a). Accordingly, the circuit held that the taking was for a public purpose and use. (App. 14a,

22a). Finally, the circuit court found "no evidence of fraud," and found that the taking was not arbitrary or capricious. (App. 14a, 22a).

Following additional proceedings which are not relevant to the issue raised on appeal, the circuit court entered a Final Order on April 24, 2006. (App. 2a). The Final Order recited that the parties had agreed that $50,000.00 represented just compensation for the property. (App. 3a).

The Lacys subsequently filed a Petition for Appeal to the Supreme Court of Virginia. On October 25, 2006, the Supreme Court of Virginia refused the Petition, finding "no reversible error in the judgment complained of." (App. 1a). This proceeding followed.

**B. Material Facts**

Introduction

The County disagrees with the Lacys' statement of facts. That statement omits crucial evidence which formed the basis for the Board's decision to condemn the property and supports the circuit court's decision upholding the condemnation. Further, the Lacys characterize facts in a manner contrary to the actual factual findings of the circuit court, which heard the evidence *ore tenus*. In accordance with Rule 15(2) of the Rules of the United States Supreme Court, the County will point to misstatements of fact in the Petition.

King Village Trail

"King Village" is an African-American community of 15 homes accessed by a long-established prescriptive easement. King Village Trail is a right-of-way, established by prescriptive easement, across the land of the Lacys that

provides the only means of access to the King Village community. King Village Trail, which is approximately nine-tenths of a mile long, connects State Route 614 to King Village. (App. 110a, 126a, 141a, 144a-147a, 181a, 190a, 297a-298a). In addition to serving the residents of King Village, King Village Trail is also traveled by the Lacys and the Roberts, who live along the road. (App. 152a-153a).

Public Safety and Welfare Concerns

King Village Trail is a dirt road covered with gravel, which frequently washes away. (App. 126a, 145a). Deep pot holes and trenches mar the road and fill with water during rains, preventing vehicular travel. (App. 142a, 152a, 211a). King Village Trail is so narrow that two vehicles cannot pass at the same time, creating a hazard when vehicles are forced to back up to allow another vehicle to pass. (App. 126a, 142a, 151a, 153a, 168a, 184a). When it rains, the road gets slick and vehicles "slide off the road." (App. 151a).

Because the road is not wide enough to support a school bus, children from King Village must wait for the bus at a stop almost one mile from their homes. (App. 135a, 148a, 228a, 232a). Fire and rescue vehicles have experienced difficulty navigating the road, and on occasion have been unable to reach residents of King Village who have called for emergency assistance. (App. 135a, 154a-157a, 167a). One man died in the car of a King Village resident, who was trying to take the man to the hospital when rescue vehicles could not travel the existing road. (App. 155a). One resident, who is a police officer, has been unable to drive his police vehicle on the gravel road when weather conditions render the road impassable. (App. 163a-165a).

One resident of King Village went without heating oil for her home for several days because the poor condition of the

existing road prevented navigation by the delivery truck. (App. 153a-154a). Utility vehicles have also been prevented from reaching King Village due to the condition of the existing road. (J.A. 154a). On one occasion, a funeral hearse was unable to travel down King Village Trail to deliver a body to a cemetary located at the end of the gravel road. (App. 157a-158a).

King Village residents have tried to maintain the existing road by regularly dragging it, covering it with gravel, putting rocks in the potholes, and cutting brush. (App. 146a, 160a-161a, 166a, 282a). The effective life of these improvements, however, has been short.[2] (App. 166a-167a).

The Board's Consideration of the Public Safety Issues

The construction of a road between State Route 614 and King Village had been a topic of debate before the Board for over 25 years. (App. 121a). The residents of King Village shared their concerns about the existing gravel road with the Board. (App. 147a-148a). During public hearings, the Board heard testimonials from residents and citizens concerning the inability of fire and rescue vehicles to provide emergency assistance to residents, as well as other complaints about the condition of the existing road relating to public safety and welfare. (App. 157a, 168a, 202a, 223a).

The Board also considered a Road Viewer's Report, which advised that the proposed road would improve public safety. (App. 185a-188a, 225a). Contrary to the Lacys' characterization of this Report in their Petition, the Report

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[2] At one time, the residents of King Village offered to buy this land from the Lacys, but no agreement could be reached. (App. 147a). The Lacys also offered to donate property for a road, but later withdrew the offer. (App. 194a-195a, 206a, 292a-293a).

was not limited to the needs of the King Village residents, but identified safety issues related to the existing right-of-way. (Compare App. 185a-188a with Pet. For Wr. of Cert., p. 5).

The Board considered alternatives to condemnation, including an alternate route, but found these options unacceptable, principally due to cost. (App. 191a, 201a-202a, 208a, 210a).

The Lacys also suggest in their Petition that the Board approved the taking only to "serve" the residents of King Village. (Pet. for Wr. of Cert., p. 5-6). To the contrary, the Board approved the taking of the right-of-way in the interest of public safety and welfare.[3] (App. 183a, 210a, 213a). As one Board member testified, the road will serve the King Village residents, but also will be "a public road, open to anybody who happens to visit, or emergency vehicles who happen to be needed." (App. 181a). Yet another Board member testified that the road will benefit "[t]he general public, especially the residents." (App. 217a). One Board member received information that the new road would also benefit the Lacys' farming business. (App. 203a-204a). Some Board members personally inspected the road, and testified to its "deplorable" condition. (App. 223a). According to one Board member, "I wouldn't take my pet down that road." (App. 221a).

Further, the circuit court found that the road would be for public use, and the taking would not benefit a particular

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[3] At the evidentiary hearing, the Lacys attempted to make race an issue in the case. (App. 112a - 115a, 130a-134a). The Lacys are white; six of the eight Board members are Caucasian; the residents of King Village are African-American. (App. 114a, 212a-213a). Although this theme pervaded the proceeding below, at the Lacys' insistence, the Lacys have apparently abandoned it for appeal.

group of individuals. (App. 21a-22a). Therefore, the Lacys misstate the purpose of the road.

In their Petition, the Lacys also suggest that the County took their property to permit subdivision of the property in King Village and to increase the property values in King Village. (Pet. For Wr. Of Cert., pp. 12-13). This suggestion is incorrect. The Lacys offered no evidence at trial that the County acquired the right of way for this purpose. Indeed, the parts of the record to which the Lacys cite for these assertions simply do not support those assertions. (Id. at 12-13). Therefore, the Lacys' representations concerning the County's motivation in acquiring this property are inaccurate and unsupported by the record.

King Village Trail will Become a Public Road

Throughout their Petition, the Lacys incorrectly describe King Village Trail as a "driveway." (Pet. For Wr. Of Cert., pp. 4, 7, 10, 14). As the trial court specifically found, King Village Trail is a road, not a driveway, and it was sought for the purpose of constructing a road that will serve the general public, including the Lacys, the Roberts and the residents of King Village. (App. 21a).

The Virginia Department of Transportation ("VDOT") has committed to funding improvements to improve the road and make it part of the state highway system. (App. 172a, 207a). King Village Trail, then, will become a public road. (App. 186a-187a, 214a). Funding to build the road will come from the Commonwealth of Virginia, pursuant to the Rural Addition Policy, and will amount to approximately $190,000.00. (App. 111a, 205a, 207a, 267a, 276a).

## ARGUMENT

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT PROHIBIT THE COUNTY FROM EXERCISING ITS POWERS OF EMINENT DOMAIN TO ACQUIRE PROPERTY FOR A RIGHT-OF-WAY TO CONSTRUCT A PUBLIC ROAD WHICH WILL BE OPEN TO THE GENERAL PUBLIC AS PART OF THE COMMONWEALTH OF VIRGINIA'S SECONDARY HIGHWAY SYSTEM.

Abandoning claims made at the state level,[4] the Lacys have now elected to proceed solely on a Fifth Amendment theory that the taking at issue is not for a public purpose. The only authority cited in their Petition for Writ of Certiorari is Kelo v. City of New London, 545 U.S. 469, 125 S. Ct. 2655 (2005). However, nothing in Kelo or the Fifth Amendment compels the result the Lacys urge. Neither this case nor the Fifth Amendment prohibits the County's exercise of its powers of eminent domain to acquire a right-of-way to construct a public road. In fact, the Lacys have cited no authority for the proposition that a local government may not do so.

Further, the Lacys fail to acknowledge the factual findings made by the circuit court. The circuit court found that the County acquired the property in question to construct a public road, which would benefit the general public. It further found that there was no evidence that a particular group of individuals is using the government's power of

[4] In both the circuit court and state appellate court, the Lacys pursued procedural claims concerning the condemnation. (App. 26a-27a). Those claims were rejected below. (App. 1a, 26a-27a).

eminent domain to take property for that group's benefit. Finally, the circuit court concluded that there was no evidence of fraud, rejecting the Lacys' argument that the taking was a pretext to benefit the King Village residents. (App. 14a, 21a-22a). These findings,[5] which are supported by the record, resolve the question presented to this Court.

### A. The County's Decision to Take the Lacys' Property is Entitled to Substantial Deference Because the County Reasonably Believed that Constructing a Public Road would Improve the Safety and Welfare of Those Using the Road.

The Lacys fail to acknowledge the deference this Court gives to legislative decisions to take property for the public good. This Court's Fifth Amendment jurisprudence reflects the "deferential approach to legislative judgments in this field." Kelo, 545 U.S. at 453, 125 S. Ct. at 2664 (discussing Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98 (1954) and Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321 (1984)). This Court has long acknowledged the "'great respect' that [it] owe[s] to state legislatures and state courts in discerning local public needs." Id. (quoting Hairston v. Danville & Western R. Co., 208 U.S. 598, 606-607, 28 S. Ct. 331 (1908)). In practice, this Court has "eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." Id. at 454, 125 S. Ct. at 2664.

Consistent with its "longstanding policy of deference to legislative judgments" in takings cases, this Court has defined the term "public purpose" broadly. Id. at 452, 125 S.

[5] The Lacys do not, and cannot, contend that the circuit court's factual findings are unsupported by the evidence.

Ct. at 2664. In Kelo, for example, this Court found "no basis for exempting economic development from our traditionally broad understanding of public purpose." 545 U.S. at 455, 125 S. Ct. at 2665-2666. If the government has a legitimate purpose and rationally could believe that a taking could promote that purpose, the taking satisfies the requirements of the Fifth Amendment. See id. at 457, 125 S. Ct. at 2667.

The County's decision to acquire land for a right-of-way to construct a public road is based upon concerns for the safety and welfare of those who use the existing gravel road. King Village Trail is not passable by two vehicles, and often not by one vehicle in bad weather. Vehicles backing up to permit passage by another vehicle created a safety hazard. (App. 126a, 142a, 151a, 153a, 168a, 184a). Because fire and rescue vehicles often could not travel down the road, the residents of King Village were literally at the mercy of the road in an emergency. (App. 135a, 154a-157a, 163a-165a, 167a). For example, one man died in the car of a King Village resident who was trying to take him to the hospital because rescue vehicles could not travel the road. (App. 155a). School buses could not use this road, forcing the children who live in King Village to wait at a bus stop almost one mile from their home. (App. 135a, 148a, 228a, 232a). Efforts to maintain the road in good condition were short-lived due to frequent wash-outs, creating a continuing safety problem for those using the existing road. (App. 166a-167a).

On this record, the County's taking was based upon a legitimate purpose that was designed to promote the public good. These facts, as communicated to the Board, plainly show that King Village Trail was unsafe and posed a legitimate public safety issue. Further, the County could reasonably believe that taking the property for a right-of-way to construct a public road would promote the purpose of reducing the safety hazards of the existing road. In fact, the

Road Viewer's Report confirmed that construction of a public road would reduce the existing safety risks. (App. 187a-188a). In light of this evidence, the County was not required to consult with school or emergency personnel, as the Lacys incorrectly claim. (Pet. For Wr. Of Cert., p. 11). Therefore, the taking satisfies the Fifth Amendment. Kelo, 545 U.S. at 457, 125 S. Ct. at 2667.

The Lacys incorrectly suggest that there can be no public purpose for the taking because the King Village residents requested and paid for the acquisition of the property by tendering $12,000.00. (See Pet. For Wr. Of Cert., pp. 8-9). This argument impermissibly "confuses the *purpose* of the taking with its *mechanics*." Kelo, 545 U.S. at 455, 125 S. Ct. at 2666 (italics in the original). "'It is only the taking's purpose, and not its mechanics' . . . that matters in determining public use." Id. at 453, 125 S. Ct. at 2664 (quoting Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321 (1984)). Thus, the fact that the King Village residents asked the County to take the property and offered a small sum of money[6] for that purpose, does not change the fundamental purpose of the taking, which is to improve public safety along a road which will be used by the general public.

Further, the Lacys' discussion of the impact of constructing a new public road on the family subdivision ordinances has no place in this case. (Pet. For Wr. Of Cert., p. 4, 12-13). The Lacys offered no proof that the County's condemnation decision was motivated by a desire to permit the King Village residents to subdivide and sell their property. Moreover, as discussed in the County's Statement of Facts, there is no support in the record for the Lacys' argument.

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[6] The money offered by the Lacys sits in escrow, and is but a fraction of the $50,000 the parties have agreed represents just compensation for this property. (App. 2a-3a).

B. The Public Road will Benefit Anyone Using it, not Simply the Residents of King Village.

The Lacys maintain that the taking is unconstitutional because it will serve and benefit a particular class of identifiable individuals. (Pet. For Wr. Of Cert., p. 7). The Lacys' repeated characterization of this road as a "driveway" which will only "serve" the King family lies at the root of their faulty argument. The Lacys continue to insist, as they did below, that this mile-long gravel road is a driveway that will be given to, and serve, only the King Village residents. (Pet. For Wr. Of Cert., p. 10). As the circuit court concluded, the evidence showed otherwise.

Any person who traveled King Village Trail was exposed to the road's safety hazards. Although the residents of King Village may be the most frequent users of the road, any member of the public, including fire and rescue workers, utility workers, and visitors to the Village, would benefit from the construction of a state-owned and maintained road. Indeed, the Lacys themselves will benefit from construction of this road. (App. 21a, 203a-204a).

The County has taken the property to acquire a right-of-way to construct a public road for use by the general public. The road will become part of the secondary highway system of the Commonwealth of Virginia. Thus, the road will be open to the entire public, and will not merely be a private driveway for the residents of King Village. Therefore, the circuit court's conclusion that the taking was for a public use and was not for the benefit of a particular class of identifiable individuals is fully supported by the evidence.

However, even if the taking will benefit the residents in King Village, it is nonetheless constitutional. "[T]he government's pursuit of a public purpose will often benefit individual private parties." Kelo, 545 U.S. at 455, 125 S. Ct.

at 2666. This is particularly true where, as here, a public road is involved. Those individuals who reside or work near that public road will necessarily receive some benefit from the improvement of that road. The natural benefit that inures to those who most frequently use the road, however, does not defeat the public purpose of the road in benefitting the general public.

## CONCLUSION

Nothing in the Fifth Amendment blocks the County's taking of this land for the purpose of building a road to be used by the public. In short, the taking satisfies the public use requirement of the Fifth Amendment.

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HALIFAX COUNTY, VIRGINIA

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